

APPEAL NO. 022316
FILED OCTOBER 8, 2002

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). Following a contested case hearing held on August 7, 2002, the hearing officer determined that the respondent (claimant) is entitled to supplemental income benefits (SIBs) for the second through fifth quarters and that the appellant (carrier) waived its right to dispute the claimant's entitlement to SIBs for those quarters. The carrier appeals on evidentiary grounds the determinations that the claimant is entitled to SIBs for the third, fourth, and fifth quarters and that it waived its right to dispute such entitlement for those quarters. The claimant filed a response, urging the sufficiency of the evidence to support the challenged findings. The determination that the claimant is entitled to SIBs for the second quarter is not appealed and has become final. Section 410.169.

DECISION

Affirmed.

The claimant introduced documents reflecting that his Application for [SIBs] (TWCC-52) forms for the second through fifth quarters were received by the carrier on March 14, 2002, and that the carrier's Request for Benefit Review Conference [BRC] (TWCC-45), which stated its dispute of the claimant's entitlement to SIBs for those quarters, was typed on March 25, 2002, and received by the Texas Workers' Compensation Commission's (Commission) central office on April 5, 2002. Section 408.147(b) provides that if an insurance carrier fails to make a request for a BRC within 10 days after the date of the expiration of the impairment income benefits period or within 10 days after receipt of the employee's statement, the insurance carrier waives the right to contest entitlement to and the amount of SIBs. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE §130.108(d) (Rule 130.108(d)) provides, in part, that if an insurance carrier disputes entitlement to a subsequent quarter and has paid SIBs during the quarter immediately preceding the quarter for which the TWCC-52 is filed, the carrier shall dispute entitlement to the subsequent quarter by requesting a BRC within 10 days after receiving the TWCC-52, and, that a carrier waives the right to contest the entitlement to SIBs for the subsequent quarter if the request is not received by the Commission within 10 days after the carrier received the TWCC-52.

At the hearing, the carrier called no witnesses and offered no documentary evidence. In its closing argument, the carrier contended that because it did not know when the Commission approved the claimant's SIBs application for the first quarter, and because the claimant sent his applications for the second through fifth quarters to the carrier at the same time, it had no obligation to dispute entitlement for the latter quarters within 10 days of receiving those applications. The parties stipulated that on March 14, 2002, the claimant was determined to be entitled to SIBS for the first quarter. The hearing officer states in her discussion of the evidence that by March 14, 2002, the

Commission had entered its determination of the claimant's entitlement to SIBs for the first quarter and that "[t]here is no evidence of when this was received by the Carrier, though it is noted that it was received by the Claimant's attorney's office as of March 18, 2002." Though challenging the conclusion that it waived its right to contest the claimant's entitlement to SIBs for the second through fifth quarters, the carrier does not appeal findings that on March 14, 2002, it received the claimant's TWCC-52 forms for the second through fifth quarters and that it filed a dispute with the Commission on April 5, 2002, a period greater than 10 days. In its appeal the carrier urges the Appeals Panel to consider the argument advanced by the insurance carrier in Texas Workers' Compensation Commission Appeal No. 970612, decided May 21, 1997, notwithstanding that this argument was "not clearly articulated in the [hearing] transcript." However, Appeal No. 970612 had to do with the carrier's obligation to dispute entitlement within 10 days in a reinstatement of SIBs scenario, as distinguished from a continuation of SIBs scenario. For further explication of this distinction, see Texas Workers' Compensation Commission Appeal No. 020356, decided March 19, 2002. We are satisfied that the aforesaid unappealed findings sufficiently support the appealed conclusion that the carrier waived its right to dispute the claimant's entitlement to SIBs for the second through fifth quarters and that this determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

Concerning the merits of the findings of entitlement for the second through fifth quarters, the parties stipulated that the qualifying periods for the second through fifth quarters commenced on February 18, 2001, and ended on February 17, 2002, and that the claimant did not seek employment and had no earnings during those periods. The requirements for entitlement to SIBs are provided for in Sections 408.142 and 408.143 and Rule 130.102. Rule 130.102(d)(4) provides the criteria for establishing a "good faith" attempt to obtain employment commensurate with a claimant's ability to work in a case, such as this, where the claimant contends he had no ability to work in any capacity during the qualifying periods. In findings appealed by the carrier, the hearing officer found that the claimant, who first underwent lumbar spine fusion surgery in November 1999, had another lumbar spine fusion with bone graft in May 2001; that this condition continued to deteriorate; that the claimant was on medication during the qualifying periods which caused drowsiness and affected his ability to operate heavy equipment; that the medical evidence established that the claimant had a total inability to work during the qualifying periods at issue; and that the claimant sustained a serious injury with lasting effects and established that his unemployment was a direct result of his compensable injury. We are satisfied that the challenged findings are not against the great weight of the evidence. Cain, supra; King, supra. The hearing officer could note the absence of any record that showed that the claimant had an ability to work and could consider the February 22, 2002, report of the claimant's treating doctor, Dr. K, as meeting the requirement for a narrative report which explains how the claimant's injury keeps him from being able to perform any type of work.

The decision and order of the hearing officer is affirmed.

The true corporate name of the insurance carrier is **UNIVERSAL UNDERWRITERS INSURANCE/ZURICH** and the name and address of its registered agent for service of process is

**GARY SUDOL
ZURICH NORTH AMERICA
9330 LBJ FREEWAY, SUITE 1200
DALLAS, TEXAS 75243.**

Philip F. O'Neill
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Gary L. Kilgore
Appeals Judge